

JAN 28 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANTIAGO SOTO,

Plaintiff - Appellant,

v.

T. FELKER, Warden; et al.,

Defendants - Appellees.

No. 06-16878

D.C. No. CV-04-00571-FCD/GGH

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN and PAEZ, Circuit Judges.

California state prisoner Santiago Soto appeals pro se from the district court's summary judgment for defendant in his 42 U.S.C. § 1983 action alleging that the High Desert State Prison outdoor exercise policy violates his Eighth

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Amendment rights. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Morrison v. Hall*, 261 F.3d 896, 900 (9th Cir. 2001), and we affirm.

The district court properly granted summary judgment on Soto's Eighth Amendment claim because Soto's conclusory allegations that the prison's policy limited outdoor exercise to three hours or less each week were insufficient to controvert defendants' evidence showing that the policy provided inmates with at least four and half hours of exercise. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (holding conclusory allegations unsupported by factual data are insufficient to defeat a motion for summary judgment).

To the extent Soto challenged the exercise policy as applied, he failed to raise a triable issue of fact as to whether Warden Runnels was deliberately indifferent to the alleged encroachments on Soto's outdoor exercise time. *See Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994) (holding Eighth Amendment claim requires prison official to have a sufficiently culpable state of mind).

AFFIRMED.